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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER BRADLEY BESS,

Defendant and Appellant.

C062417

(Super.Ct.Nos.
CM030490 & CM030528)

In March 2009, defendant Christopher Bradley Bess entered a negotiated plea of no contest in case No. CM030490 to possessing methamphetamine for sale (Health & Saf. Code, § 11378). In May 2009, he entered a negotiated plea of no contest in case No. CM030528 to receiving stolen property (Pen. Code, § 496, subd. (a); further section references are to the Penal Code) and admitted having a prior serious felony conviction (§§ 667, subds. (a)-(d), 1170.12, subd. (a)) and having served a prior prison term (§ 667.5, subd. (b)). Sentencing defendant in both cases, the trial court imposed an aggregate prison term of seven years eight months (the upper term of

six years for receiving stolen property, plus one year for the prior prison term enhancement, and a consecutive eight months for the drug offense).

On appeal, defendant contends the trial court abused its discretion in imposing the upper term by failing to properly weigh and consider factors in mitigation. We disagree and shall affirm the judgment.

DISCUSSION

I

The trial court stated that it was imposing the upper term for the receiving stolen property conviction because defendant had two prior felony convictions and four prior misdemeanor convictions, he was on probation when the crime was committed, and the crime "involved criminal sophistication resulting in losses exceeding \$100,000 to the various victims."

Defendant argues the court engaged in a prohibited dual use of facts when it used his prior felony conviction as both a factor in aggravation and to enhance his sentence by one year.¹ The claim of error is forfeited because he failed to raise the objection in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354-355.)

¹ California Rules of Court, rule 4.420(c) states: "To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term."

Defendant also claims the court failed to weigh and consider the mitigating factors that he "committed the offense while under coercion or duress since he was using and heavily addicted to methamphetamine, [he] suffered from a mental or physical condition that significantly reduced culpability for the crime -- the addiction to methamphetamine[], [he] voluntarily acknowledged wrongdoing early on in the proceedings, and [his] prior performance on parole was satisfactory as [defendant] finished two earlier parole grants with no violations." He also argues his prior "felonies were remote"; aside from the prior conviction for the serious felony of assault in violation of section 245, subdivision (a), he "had no other record of committing crimes of violence"; and the "underlying offenses were not substantially more serious than other similar offenses.

A trial court is required to state on the record its reasons for the term selected (Cal. Rules of Court, rule 4.420(e)), which it did in this case, but the court is not required to verbally state that it considered factors in mitigation or state the reasons for rejecting them. (*People v. Mendonsa* (1982) 137 Cal.App.3d 888, 896; Evid. Code, § 664 [we presume that official duty has been regularly performed].) Nevertheless, at the commencement of the sentencing hearing, the court stated it "had the opportunity to read, review, and consider the Statement in Mitigation filed on the defendant's behalf" by his counsel. This shows that the court did consider the alleged factors in mitigation.

As we will explain, the mitigating factors claimed by defendant have severe deficiencies.

The probation officer's report observed, without contradiction from defendant, that defendant relapsed into his drug use in 1998 after he lost his job, that he "has an ongoing drug addiction for which he blames most of his illegal activities," and that, "[d]espite the opportunities afforded to him by prior grants of probation, he has failed to maintain his sobriety for any significant length of time." Where, as here, a defendant fails to address his addiction even though he has the opportunity to do so, the trial court may consider the addiction to be an aggravating factor, not a mitigating factor. (*People v. Williams* (1998) 17 Cal.4th 148, 163; *People v. Reyes* (1987) 195 Cal.App.3d 957, 963 [when a defendant has a substance abuse problem that was a substantial factor in the commission of a crime and "has failed to deal with the problem despite repeated opportunities," the "need to protect the public from further crimes by that individual suggests that a longer sentence should be imposed, not a shorter sentence"].)

As to defendant's purported early acknowledgement of guilt, a plea of guilty or no contest "resulting from a plea bargain is not a sufficient acknowledgment of guilt to constitute a mitigating factor since the admission is only to receive a benefit from the prosecution." (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1318.) In exchange for his plea, defendant received the dismissal, with a Harvey waiver (*People v. Harvey* (1979) 25 Cal.3d 754), of six other counts of receiving stolen property. Thus, his early acknowledgment of guilt is not a mitigating factor.

Defendant's claim that he performed well on his two grants of parole is offset by the fact he was on probation when he committed

the receiving stolen property offense for which he received the upper term.

The record also undermines defendant's claim that his prior felony convictions should not have carried much weight because they were too remote. Defendant was convicted of assault with a deadly weapon in February 1999 and of receipt of stolen property in November 2004. Defendant committed other crimes for which he was convicted in 1990, 1993, 1995, 1996, and 2008. Commencing in 1999, he was sentenced to state prison for four years; and he was again sentenced to prison for three years in 2004. Therefore, his prior felonies were simply a continuation of a life of crime and cannot be considered too remote for consideration of the upper term. (See *People v. Beagle* (1972) 6 Cal.3d 441, 453 [for a prior conviction to be excluded as remote, in the interim the defendant must have led a "'legally blameless life'"].)

Contrary to defendant's suggestion, the absence of a history of violent crime other than his prior serious felony conviction is not a mitigating factor. Also not a mitigating factor is his claim that the conduct which gave rise to his receiving stolen property conviction was not, in his view, substantially more serious than other similar offenses.

In sum, the trial court did not abuse its discretion by imposing the upper term.

II

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the claim that amendments to section 4019, effective January 25, 2010, apply

retroactively to his pending appeal and entitle him to additional presentence credits.

However, because he has a prior serious felony conviction, defendant is not entitled to the additional presentence conduct credits afforded by section 4019, operative January 25, 2010. (See Pen. Code, § 4019, subds. (b)(1), (b)(2), (c)(1), (c)(2).)

DISPOSITION

The judgment is affirmed.

SCOTLAND, P. J.

We concur:

SIMS, J.

BUTZ, J.